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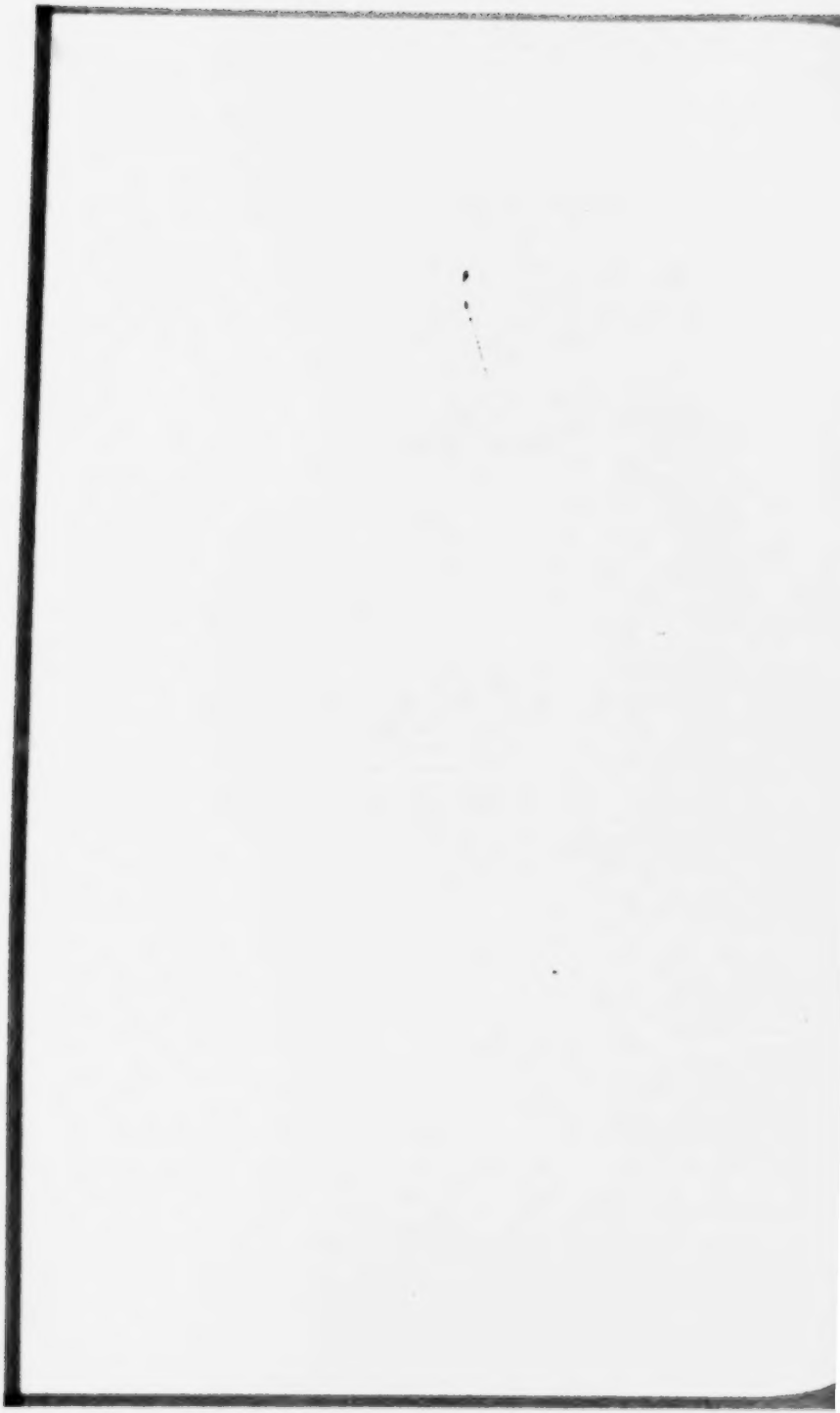
CITATION

Case:

Henderson v. *United States*, 237 F. 2d 169 6



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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 759

WILLIAM M. JOHNSON AND WALTER O'NEAL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 273 F. 2d 33.

JURISDICTION

The judgment of the court of appeals was entered December 14, 1959. A petition for rehearing was denied on January 14, 1960, and a second petition for rehearing was denied February 24, 1960. The petition for a writ of certiorari was filed March 3, 1960.

QUESTIONS PRESENTED

1. Whether the evidence supports the verdict.
2. Whether the charge on entrapment covered the count on which the petitioners were convicted.
3. Whether the submission to the jury of a conspiracy count, on which the petitioners were acquitted, resulted in prejudice on the substantive count.

STATEMENT

In the United States District Court for the Southern District of Florida, the petitioners were convicted on a charge of possessing, on May 18, 1955, liquor to which proper revenue stamps had not been affixed. Mr. Johnson was sentenced to imprisonment for three years and Mr. O'Neal for nine months (R. 258-260). On appeal the judgment was affirmed.

The trial was consolidated with another indictment charging a conspiracy among the petitioners and one Robert Branch to possess, remove and conceal non-tax paid liquor from April 1, 1955, to May 18, 1955. The evidence showed that on May 11, 1955, a government investigator who was with an informer, Mr. Richardson, spoke to petitioner Johnson about buying 25 jugs of whiskey. Mr. Johnson said he had only 20 hidden near Baldwin (R. 20). That afternoon the agent and informer went to Mr. Johnson's house. After a conversation between the informer and Mr. Johnson, Branch led the agent and informer to a spot about five miles away, then took their car and returned it with 20 5-gallons jugs of whiskey which did not have the required stamps (R. 22-26). The agents gave Mr. Branch $200 (R. 25).

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On May 18, after the informer made a call, the agent, the informer and a state officer went to Mr. Johnson's house (R. 27). Mr. Johnson arrived later, and then Mr. O'Neal (R. 27-28). Mr. Johnson said Mr. O'Neal would load the agent's car (R. 28). Later, Mr. Johnson drove the agent to a spot some distance away and left (R. 30-31). Mr. O'Neal arrived with the agent's car loaded with 25 jugs of non-tax-paid whiskey (R. 31).

Mr. Johnson, in his own behalf, testified that, on May 11, the informer Richardson introduced him to the man who proved to be the government agent at a restaurant, and that Mr. Richardson said he was looking for a load of liquor to pay the bills of his mother who was in the hospital. Mr. Johnson said he denied being in the liquor business (R. 97-102). Later Mr. Richardson and the agent came to Mr. Johnson's home (R. 114). He said that, when Mr. Branch came in while Mr. Richardson and the agent were there, he told Mr. Branch that Mr. Richardson wanted liquor (R. 116).[1] Mr. Johnson denied seeing Mr. Richardson or the agent on May 18 (R. 120) and denied seeing Mr. O'Neal on that day (R. 121). Mr. O'Neal also denied delivering liquor on May 18 (R. 175).

The trial court was of the view that there was no showing of agreement between Mr. Branch and Mr.

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[1] Mr. Branch testified that he acted on his own in selling the liquor on May 11 and kept the money himself (R. 141-143). He also stated that he was in jail on May 18, 1955 (R. 144).

O'Neal, and directed the government to elect whether it would proceed against one or the other on the conspiracy count, the charge to be confined to the overt acts in which the one chosen had participated (R. 216-217). The government elected to proceed against Mr. Branch for the events on May 11. The case was submitted to the jury against Mr. Branch and Mr. Johnson on the conspiracy count limited to May 11 (R. 228, 230-231, 237-238). The jury acquitted on conspiracy, but convicted petitioners Johnson and O'Neal on the substantive count, based on the events of May 18 (R. 255).

ARGUMENT

1. As the court below ruled, the evidence amply supports the verdict. As to the events of May 18, the issue was one of credibility as between the agent who testified to the purchase and the testimony of petitioners denying that they ever saw the agents on that day. That issue was for the jury to resolve.

2. The argument that the judge should not have submitted the conspiracy count to the jury is of no significance since petitioner Johnson was acquitted together with Mr. Branch on that charge, and the court itself dismissed the charge as to petitioner O'Neal. Testimony as to prior dealings on May 11 would have been admissible regardless of the conspiracy count, in order to explain the events of May 18.

3. On the issue of entrapment, the court did say out of the jury's presence that it saw no reason to charge on entrapment as to the events of May 18

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since the defendants denied that the events ever took place (R. 206). The petitioner's counsel stated that he agreed with the court (R. 206). The charge as given, was not, however, so limited. The court did say that, as to the events of May 11, Mr. Johnson asserted "that he was entrapped into whatever participation he may have had with those matters" (R. 246), but this was merely an accurate summary of the testimony given by Mr. Johnson, who claimed that, at this one time, he told Mr. Branch that Mr. Richardson wanted liquor. The court later said that if the jury "should find from the evidence that, before anything at all occurred respecting the *alleged offenses* involved in this case, the accused Johnson was ready and willing to commit *crimes such as those charged in the indictment* whenever opportunity was offered the the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment (R. 247)." (Emphasis added.) Hence, although the court, under the evidence, necessarily stressed the events of May 11, we do not think its charge on entrapment would be understood as applying to that offense alone.

Even if the instructions are read as limited to the events of May 11, we do not believe that there was error under the facts of this case. While normally, an accused may deny committing an act and also assert that, if he did it, he was entrapped, the situation here on entrapment was different from the usual case. Petitioner O'Neal offered no evidence on entrapment at all. Petitioner Johnson's defense of entrapment was that he merely informed Mr. Branch

of the request of Mr. Richardson on May 11. In other words it was a defense of entrapment as to one limited situation, and not a claim that he had been entrapped generally into the liquor business. Under these circumstances, the trial judge could properly conclude that, as to the substantive offense alleged to have occurred on May 18, no evidence as to entrapment had been offered. See *Henderson* v. *United States*, 237 F. 2d 169, 173 (C.A. 5), where the court, in holding that inconsistent defenses are available, recognized that this may not apply in particular situations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1960

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